

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JUAN CARLOS RIVERA,

Plaintiff,

v.

WACHOVIA BANK, a National Banking Association; WACHOVIA MORTGAGE CORPORATION, a North Carolina corporation f/k/a WORLD SAVINGS BANK, FSB; and DOES 1-200, inclusive,

Defendants.

CASE NO. 09 CV 0433 JM (AJB)

ORDER GRANTING DEFENDANT WACHOVIA MORTGAGE'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

(Doc. No. 21)

Plaintiff Juan Carlos Rivera ("Plaintiff") initiated this action in California state court, advancing several claims which arose out of a residential mortgage refinancing transaction. Defendant Wachovia Mortgage, FSB ("Wachovia"), erroneously named and sued as Wachovia Bank, N.A. and Wachovia Mortgage Corporation, removed the action to federal court on March 4, 2009. (Doc. No. 1.) The court enjoys subject matter jurisdiction based on diversity. (See Doc. No. 19.)

Pending before the court is Wachovia's motion to dismiss Plaintiff's First Amended Complaint (Doc. No. 20, "FAC") under Federal Rule of Civil Procedure ("Rule") 12(b)(6). (Doc. No. 21.) Based on full briefing by the parties, including Plaintiff's opposition (Doc. No. 22, "Opp'n") and Wachovia's reply ("Doc. No. 24, "Reply"), the court found the matter appropriate for determination without oral argument.

1 For the reasons set forth below, the court **GRANTS** Plaintiff's motion to dismiss and
 2 **DISMISSES** Plaintiff's FAC with prejudice.

3 **I. BACKGROUND**

4 On October 22, 2004, Plaintiff and his wife obtained an adjustable rate home mortgage loan
 5 for \$353,400 from World Savings Bank, FSB, now Wachovia Mortgage, FSB, through which they
 6 refinanced their Escondido home. (FAC ¶¶ 4, 10; Req. for Jud. Not., Exh. 5 at 11.) The loan was
 7 secured by a Deed of Trust on Plaintiff's property. (FAC, generally; Doc. No. 21-3, Req. for Jud.
 8 Not., Exh. 6.) Plaintiff later defaulted on the loan, leading to the initiation of foreclosure proceedings.
 9 (FAC ¶ 12.) The present status of any pending or completed foreclosure sale is unclear from the
 10 parties' submissions.

11 Plaintiff alleges that although Wachovia knew he could not afford the mortgage payments, the
 12 lender induced him to sign the loan documents through inadequate disclosures of the applicable
 13 interest rate and its adjustment over time, and through misrepresentations about his ability to pay, the
 14 allocation of monthly payments between principal and interest, and the amortization feature of the
 15 loan. (FAC ¶¶ 32-34.) Plaintiff asserts that, at the time of signing, he understood the loan terms to
 16 include fixed monthly payments and interest rate for the first three years (although Plaintiff
 17 acknowledges he anticipated "a slight adjustment" to the interest rate) and a pre-payment penalty
 18 during the same period. (FAC ¶¶ 10, 13.) According to Plaintiff, it was not until January 2007 that
 19 he discovered both the principal balance and interest rate had dramatically increased. (FAC ¶ 11.)

20 Plaintiff asserts state law claims for fraud, breach of contract, breach of contractual covenant
 21 of good faith and fair dealing, unfair business practices, and conspiracy, and to quiet title. Plaintiff
 22 seeks injunctive relief, damages, attorneys' fees and costs, and a court order declaring the loan
 23 transaction void.

24 **II. DISCUSSION**

25 **A. Legal Standards**

26 Rule 12(b)(6) dismissal is proper only in "extraordinary" cases. U.S. v. Redwood City, 640
 27 F.2d 963, 966 (9th Cir. 1981). In evaluating a 12(b)(6) motion, the court must accept the complaint's
 28 allegations as true and construe them in the light most favorable to Plaintiff. See, e.g., Concha v.

1 London, 62 F.3d 1493, 1500 (9th Cir. 1995), cert. dismissed, 116 S.Ct. 1710 (1996). However, the
 2 complaint's "factual allegations must be enough to raise a right to relief above the speculative level...."
 3 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007) (allegations must provide "plausible grounds
 4 to infer" that plaintiff is entitled to relief). The court should grant 12(b)(6) relief where the complaint
 5 lacks either a "cognizable legal theory" or facts sufficient to support a cognizable legal theory.
 6 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990). In testing the complaint's legal
 7 adequacy, the court may consider material properly submitted as part of the complaint, including
 8 exhibits attached thereto, or material subject to judicial notice. Swartz v. KPMG LLP, 476 F.3d 756,
 9 763 (9th Cir. 2007). Furthermore, under the "incorporation by reference" doctrine, the court may
 10 consider documents "whose contents are alleged in a complaint and whose authenticity no party
 11 questions, but which are not physically attached to the [plaintiff's] pleading." Janas v. McCracken (In
 12 re Silicon Graphics Inc. Sec. Litig.), 183 F.3d 970, 986 (9th Cir. 1999) (internal quotation marks
 13 omitted).¹

14 **B. Analysis**

15 Wachovia, a federally chartered savings bank, contends all of Plaintiff's state law claims are
 16 preempted by the Home Owners' Loan Act of 1933, 12 U.S.C. § 1461 *et seq.* ("HOLA"), and the
 17 regulations issued thereunder by the Office of Thrift Supervision ("OTS"), because the factual
 18 underpinnings of these claims fall within HOLA's preemptive scope.

19 Under HOLA, OTS enjoys "plenary and exclusive authority...to regulate all aspects of the
 20 operations of Federal savings associations" and its authority "occupies the entire field of lending
 21 regulation for federal savings associations." 12 C.F.R. §§ 545.2, 560.2(a). The Ninth Circuit agreed,
 22 characterizing the enabling statute and subsequent agency regulations as "so pervasive as to leave no
 23 room for state regulatory control." Conference of Fed. Sav. & Loan Ass'ns v. Stein, 604 F.2d 1256,
 24 1260 (9th Cir. 1979), aff'd, 445 U.S. 921.

25 In elaborating on the reach of HOLA, the Supreme Court held, "A savings and loan's mortgage

27 ¹ To this end, the court may consider the Mortgage Note, Deed of Trust, Truth in Lending
 28 Disclosure, and payment coupons provided by Wachovia in its Request for Judicial Notice. (Doc. No.
 21-3, Exhs. 5-8.) As Wachovia's status as a federal savings bank is not challenged, the court declines
 to take judicial notice of Wachovia's charter documents. (Doc. No. 21-3, Exhs. 1-4.)

1 lending practices are a critical aspect of its ‘operation’....” Fidelity Fed. Sav. & Loan Ass’n v. de la
 2 Cuesta, 458 U.S. 141, 167 (1982). To this end, OTS Regulation 560.2(b) expressly preempts state
 3 regulation of federal thrift activities dealing with, *inter alia*, terms of credit (including amortization
 4 of loans, deferral of interest, and adjustments to the interest rate), loan-related fees, servicing fees,
 5 disclosure and advertising, loan processing, loan origination, and servicing of mortgages. 12 C.F.R.
 6 § 560.2(b). In analyzing preemption, then, “the first step will be to determine whether the type of law
 7 in question is listed in paragraph (b).” Silvas v. E*Trade Mortgage Corp., 514 F.3d 1001, 1005 (9th
 8 Cir. 2008). If so, the state law is preempted. Id. Even state laws of general applicability, such as tort,
 9 contract, and real property laws, are preempted if their enforcement would impact thrifts in areas listed
 10 in § 560.2(b). Id. at 1006; 12 C.F.R. § 560.2(c). Alternatively, such laws are preempted if they have
 11 more than an incidental effect on the lending operations of a federal savings association. 12 C.F.R.
 12 §§ 560.2(c); OTS, Final Rule, 61 Fed. Reg. 50951, 50966-67 (Sept. 30, 1996).²

13 Plaintiff seeks relief under state tort, contract, real property, and consumer protection laws of
 14 general applicability which do not explicitly regulate lending activities. However, despite his cursory
 15 argument to the contrary (see Opp’n at 5), he asks the court to apply the laws to regulate conduct
 16 which is expressly preempted by 12 C.F.R. § 560.2(b). Plaintiff’s allegations revolve entirely around
 17 the “processing, origination, [and] servicing” of the Plaintiff’s mortgage, the “terms of credit,
 18 including amortization of loans and the deferral and capitalization of interest and adjustments to the
 19 interest rate, balance, payments due, or term to maturity of the loan,” and the adequacy of disclosures
 20 made by Defendants in soliciting and settling the loan. 12 C.F.R. §§ 560.2(b)(4), (9), (10). Because
 21 the state laws on which Plaintiff relies, as applied, would regulate lending activities expressly
 22 contemplated by the § 560.2(b), the claims are preempted. See Silvas, 514 F.3d at 1006 (9th Cir.
 23 2008) (holding California’s Unfair Competition Law, as applied, was preempted because the
 24 underlying allegations dealt with misrepresentations in disclosures and advertising). There is no need
 25 for the court to proceed to the second step of the analysis.

26

27 ² State laws which do not affect lending practices might include tax statutes or zoning
 28 ordinances. See de la Cuesta, 458 U.S. at 172 (O’Connor, J., concurring) (noting HOLA’s language
 does not suggest “Congress intended to permit [OTS] to displace local laws, such as tax statutes and
 zoning ordinances, not directly related to savings and loan practices.”).

1 Wachovia also argues Plaintiff's FAC should be dismissed because Plaintiff's state law claims
2 are time-barred and fail to meet federal pleading standards. Because the claims are preempted, the
3 court declines to address these secondary arguments.

4 || III. CONCLUSION

5 For the reasons set forth above, the court hereby **GRANTS** Wachovia's motion to dismiss
6 (Doc. No. 21). Plaintiff's First Amended Complaint, including all claims raised therein, is
7 **DISMISSED** with prejudice. The Clerk of Court is instructed to close the case file.

8 || DATED: August 4, 2009

Hon. Jeffrey T. Miller
United States District Judge